

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To be argued by
HOWARD L. JACOBS

75-1355

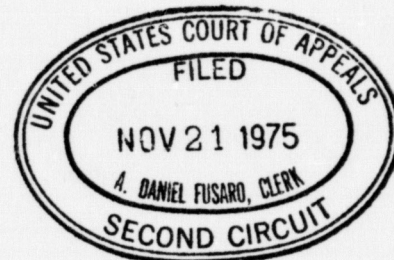
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
:
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HERBERT I. FASS
:
Defendant-Appellant.
:
-----X

DOCKET NO. 75-1355

BRIEF FOR APPELLANT

Appeal From A Judgment
of Conviction Rendered
In The United States
District Court For The
Southern District of
New York



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STATEMENT PURSUANT TO RULE 28 (3)

Preliminary Statement

This is an appeal by HERBERT I. FASS from a judgment of the United States District Court for the Southern District of New York (The Honorable Whitman Knapp) rendered October 3, 1975 after a two day jury trial, convicting appellant of damaging certain property of the United States in violation of Title 18, United State Code, Section 1361. Appellant was sentenced to thirty (30) days imprisonment by Judge Knapp.

STATEMENT OF FACTS

The Proceedings Below

Appellant was charged in a two count information with damaging the glass window on a door in the United States Post Office at Nyack, New York on June 5, 1974 and damaging a wall mural in the same post office on December 24, 1974.

The trial commenced on July 28, 1975 and the following day the jury returned a verdict of not guilty on Count One (involving the glass window on the door) and guilty on Count Two (involving the wall mural). Appellant is free on bail pending appeal.

The Government's Case

On June 5, 1974 appellant went to the Nyack Post Office and entered the office of Congressman Gilman in the basement. Upon leaving that office he walked past the postal inspector's room and scratched the words "FUCK YOU" into the glass portion of the door to

the postal inspector's room. The Postmaster ran after him and told appellant he saw him do it. Appellant said "so what" and ran off (24-28)*

Prior to this incident on May 8, 1974 appellant put decals on the mural in the lobby of the post office, on the walls and on the door to the Postmaster's office (31-35, 45-46). Also prior to June 5, 1974 appellant had taken the American flag from the flagpole outside the post office and for about one week appellant set up a stand outside the entrance to the post office to obtain signatures on a petition for removal of the mural in the post office (23-24, 35-36, 38-39).

The mural appellant sought to have removed was fastened to the wall in the Nyack Post Office in 1936 as part of a W.P.A. project. It was painted by Jacob Getlar Smith and is supposed to be a pictorial history of Rockland County spanning several hundred years (20-23).

Shortly before Christmas, 1974 appellant called the Nyack Postmaster and asked to put Christmas decorations over the offensive mural for the Christmas season. The request was turned down (61-62).

On December 24, 1974 the custodian at the post office saw appellant with a Benz-O-Matic torch standing on a trash can burning the mural. When he yelled, appellant came down and said to a postal clerk who appeared on the scene that he was sick and not to have him locked up (47-51).

A few days later appellant called the Postmaster and said he was sorry for what he had done. He said he did it because they wouldn't take

* Refers to pages of the trial transcript.

the mural down. The Postmaster told appellant he couldn't take the mural down even if he wanted to (54-56).

Appellant's Case

Appellant testified in his own behalf and in substance admitted the incidents of June 5, 1974 and December 24, 1974 and explained why he did the acts charged.

Appellant is a 38 year old metalurgical engineer who has resided for five years in Nyack, New York, one block from the post office (66-67).

He took no notice of the mural in question for two or three years. Then one day appellant took his six year old son to the post office. Upon leaving the boy said it was a good thing "cowboys always kill Indians" and said he saw the mural. Appellant then studied the mural and found it an outrage, depicting Indians slaughtering Whites and spoke to the Postmaster about it. The Postmaster informed him they were proud of the mural (67-69).

The mural shows four indians attacking a white family. One indian is shown about to scalp a white woman, another is shown struggling with her husband, a third is killing their cow and the fourth is shown setting fire to their home (80-81, Def. Ex A).

Obtaining no satisfaction from the Nyack Postmaster appellant wrote to Senators Javits and Buckley, Secretary of State Kissinger, Congressman Gilman, former Congressman Dow and the Postmaster General of the United States requesting removal of the offending mural from the Nyack Post Office. The letters were unsuccessful in getting any action with regard to removal of the mural (70-71, Def. Exs. C,E,F,G,H and I).

Appellant brought an Ogallala Sioux Princess to view the mural.

She said it was one of the most devastating pieces of Indian cruelty art she had ever seen (72-73, Def. Ex. D).

Appellant's attempt to personally meet with the Postmaster-General of the United States at his office in Washington, D.C. was unsuccessful as he was refused admission to the Postmaster-General's Office (74).

In May, 1973 appellant offered to purchase a painting for \$500 which showed another view of Indian life to hang next to the mural. He in fact obtained an option to purchase this painting. Appellant brought this painting to the post office, but the Nyack Postmaster declined the offer (75-76, Ex. B).

At about the same time, appellant obtained over 100 signatures on petitions seeking removal of the mural or permitting the hanging of the painting appellant proposed to purchase. While obtaining the signatures in front of the post office appellant was arrested for disorderly conduct by the Nyack Police Department (77-78).

Appellant admitted putting up the stickers in the post office in answer to copies of a news article favoring the mural which had been put up in various locations in the post office by the Nyack Postmaster (78-80).

Appellant testified that on June 5, 1974 he went to the Nyack Post Office to see Congressman Gilman, who was supposed to be in his office in the basement of the building. The Congressman was not in. Appellant was angry and as a spur of the moment thing scratched the words "Fuck You" in the postal inspector's door out of anger and frustration (81-82).

Appellant admitted stealing the American flag from outside the

post office to gain publicity for the removal of the mural. This again was a spur of the moment act. Appellant still has the flag and offered to return it upon removal of the mural (82-83).

Shortly before Christmas, 1974 appellant attempted unsuccessfully to have Christmas decorations put over the mural for the Christmas season (87-89). On December 21, 1974 appellant wrote to Assistant United States Attorney Gorman Reilly (the prosecutor in appellant's case) reviewing appellant's actions with regard to the mural, again requesting its removal and ending "The mural will be done before the year is out." (89, Def. Ex. J).

Receiving no reply to his letter, in anger and frustration, on December 24, 1974 appellant burnt a swastika into the mural. He was also going to burn in the word "Shame," but was interrupted by the custodian. The reason appellant, who is Jewish, burnt a swastika was to show the mural was racist. The mural, containing the swastika, still hangs in the Nyack Post Office (90-91).

Appellant testified he is not a burner of books or paintings. He is an artist himself. He has no objection to the mural hanging in a museum, but objects to its being placed in a United States Post Office where people are compelled to come to transact their business. He further testified the mural was a fabrication, as the Indians were massacred not the white people. He wanted to damage the mural to get it off the Post Office wall and to see if the Government would put it back (92-95, 97-98).

POINT ONE

THE TRIAL COURT ERRED IN NOT
CHARGING THE JURY THAT THEY
COULD FIND APPELLANT NOT
GUILTY IF THEY FOUND THE ACTS
WERE JUSTIFIED

Appellant submitted extensive evidence to show that the mural he damaged was "racist" in that it depicted four indians murdering and pillaging a white settler family. Appellant, an artist himself was outraged that such a mural should be prominently displayed in a United States Post Office where persons must come to transact their everyday business. He was particularly disturbed by the effect it had on children as evidenced by his son's remark about it being good that cowboys kill indians.

For more than twenty months appellant sought by all peaceable means available to have the mural removed from the Nyack Post Office. He wrote to the Nyack Postmaster, Senators Javits and Buckley, Secretary of State Kissinger, Congressman Gilman, former Congressman Dow and the Postmaster General of the United States seeking unsuccessfully to have the offending mural removed from the Nyack Post Office.

Appellant had the mural viewed by an Indian Princess for her opinion of its racist qualities, he unsuccessfully attempted personally to see the Postmaster General, offered to purchase a \$500 painting depicting another view of Indian life to put up next to the mural and obtained over 100 signatures on a petition seeking removal of the mural. All efforts failed to move officialdom to re-evaluate the mural's presence in the Post Office.

Finally, appellant was frustrated by the refusal of the Post Office

officials to put up decorations near the mural to soften its impact for the Christmas 1974 season. Feeling his actions were fully justified appellant, on December 24, 1974 burnt a swastika into the mural in order to get the postal officials to take down the mural.

Prior to trial appellant submitted a request to charge to the Court which in substance told the jury that if they felt appellant's acts were justified they should acquit him (34A). The Court refused to so charge (123). The Court told the jury that appellant's acts could only be considered in determining whether he committed the acts intentionally and wilfully (158-163). At the outset of their deliberations the jurors requested the Court to instruct them on the defendant's state of mind, his motive (169). Again the Court told them appellant's motives were immaterial (169-170). The Court's charge on motive was excepted to by appellant (168-169).

Justification for intentional criminal conduct is a valid defense in cases such as homicide, Harris v United States, 364 F. 2d 701 (D.C. Cir. 1966); Byrd v United States, 312 F. 2d 357 (D.C. Cir. 1962) and assault, United States v Heliczzer, 373 F. 2d 241 (2d Cir.) cert. denied, 388 U.S. 917, 87 S. Ct. 2133, 18 L. Ed 2d 1359 (1967), United States v Grimes, 413 F. 2d 1376 (7th Cir. 1969).

Why then should not justification be a valid defense to the charge of damaging Government property? Here, where appellant truly felt justified in his conduct of burning a swastika in a mural he felt was racist after failure of the Government to re-consider keeping the mural in the Nyack Post Office his conduct should be tested by a jury

of his peers who should be permitted to consider his justification as a defense.

As where self defense is offered as a defense to a homicide or assault charge the jury is to determine whether the act done and force used under the circumstances was justified by what the defendant had been confronted with.

Permitting such a determination by the jury will not allow people to take the law into their own hands for their conduct will be scrutinized by the members of the jury when they decide whether the conduct was in fact justified.

Government action or inaction such as the placing of the mural in this case on a Post Office wall is subject to challenge. Whether appellant's conduct was justified under the facts of this case was for the jury to decide under proper instructions.

The Court of Appeals for the Seventh Circuit in an income tax evasion case questioned the time honored statement that "good motives are no defense in a criminal case" stating:

"It is possible that purpose and motivation may be found by a jury to negate willfulness." United States v Snider, 502 F. 2d 645, 657 (4th Cir. 1974).

Appellant's state of mind and motivation were specifically taken away from the jury in this case. They were not permitted to determine whether appellant was justified in his actions of December 24, 1974. For that reason appellant is entitled to a new trial where the jury will properly have that issue before it.

POINT TWO

THE GOVERNMENT FAILED TO ESTABLISH
THAT THE MURAL WAS THE PROPERTY OF
THE UNITED STATES

Title 18, United States Code, Section 1361 provides:

"Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property has been or is being manufactured or constructed for the United States, shall be punished as follows:

If the damage to such property exceeds the sum of \$100, by a fine of not more than \$10,000 or imprisonment for not more than ten years, or both; if the damage to such property does not exceed the sum of \$100, by a fine of not more than \$1,000 or by imprisonment for not more than one year or both."
(Emphasis added)

The only evidence at trial bearing on the issue of whether the damaged mural was the property of the United States Government was the testimony of Irving Weber, former Nyack Postmaster who testified the mural was painted in 1936 as part of a W.P.A. project by an artist Jacob Getlar Smith and fastened to the post office wall the same year (20-23).

The Government had the burden of proving the mural was the property of the United States Government since this was an essential element of the crime charged. While the Nyack Post Office building is Government property there was no showing the mural was Government property.

Appellant moved to dismiss the case on the ground the Government failed to prove the mural was United States property and that motion was denied by the Court. By agreement with the Court this issue was not submitted to the jury but was preserved for appeal (125-126).

There was no evidence as to who bore the cost of painting the mural. It may have been paid for by the Government, the artist Mr. Smith or third parties. The mural might be Government property or the property of Jacob Getlar Smith and his heirs. Absent proof that the mural was the property of the United States Government as a matter of law the information must be dismissed.

There is nothing to indicate Title 18, United States Code, Section 1361 was intended to cover private property contained in a Government building. Being a penal statute this law should be strictly construed and limited to its plain language. United States v Braverman, 373 U.S. 405, 83 S. Ct. 1370, 10 L. Ed. 2d 444 (1963). This law should not be read to make conduct a crime which the legislature did not intend as a crime United States v Posnjak, 457 F. 2d 1110 (2d Cir. 1972).

Reading Section 1361 as limited to United States property or property manufactured or constructed for the United States, the Government has failed to prove as a matter of law that the damaged mural comes within this law and therefore the information should be dismissed.

CONCLUSION

FOR THE FOREGOING REASONS THE
JUDGMENT SHOULD BE REVERSED AND
THE CASE DISMISSED OR A NEW TRIAL
GRANTED.

Respectfully submitted,

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November 21, 1975

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